Supreme Court, U.S.
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No. 02-856

In The Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION

Petitioner

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The Port of Oakland and Commissioners of the Port of Oakland respectfully respond to the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and motion to vacate the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT

1. The Port of Oakland is a division of the City of Oakland, a municipality. The Port of Oakland owns and operates Oakland International Airport in Oakland, California.

2. In December 2000, the Federal Aviation Administration issued a Finding of No Significant Impact and Record of Decision approving a revised Airport Layout Plan for the Port of Oakland's proposed airport development program. See FAA's Petition For A Writ of Certiorari, App. B at 6a-40a. The FAA's Record of Decision states the FAA approved the revised Airport Layout Plan under 49 U.S.C. § 47107(a) and 49 U.S.C. § 40103(b). *Ibid.*, App. B at 39a. Section 47107(a) is within Part B of Subtitle VII of Title 49 of the United States Code. Section 40103(b) is within Part A of Subtitle VII of Title 49 of the United States Code. Thus, the FAA's Record of Decision is expressly based on Part A, as well as Part B of Subtitle VII.

3. In January 2001, within sixty days of the issuance of the FAA's Record of Decision, the City of Alameda and two citizens' groups filed a petition for review in the United States Court of Appeals for the Ninth Circuit. The petition

for review stated in whole: "The City of Alameda, the Citizens League for Airport Safety and Serenity, and Berkeley Keep Jets Over the Bay hereby petition the Court for review of the Federal Aviation Administration's Finding of No Significant Impact and Record of Decision dated December 21, 2000, approving the Airport Development Program at Oakland International Airport." The petition for review did not indicate the legal grounds for the petitioners' claims or the specific portions of the FAA's Record of Decision that were being challenged. In its brief before the Ninth Circuit, the petitioners asked the Court to suspend the FAA's approval of the Airport Layout Plan (except for the Airport Roadway Project component of that Plan) and to enjoin the Port of Oakland from taking action in reliance of the FAA's approval of the Plan.

4. Prior to filing the petition for review of the FAA's Record of Decision, the same petitioners had challenged the Port of Oakland's approval of its airport development program in the Superior Court for the County of Alameda. In August 2001, during the briefing on the merits in the Ninth Circuit, the State of California Court of Appeal issued a final decision requiring the Port of Oakland to take additional actions under the California Environmental Quality Act prior to implementing portions of its airport development program. See *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*, 91 Cal. App. 4th 1344 (2001). The State Court of Appeal decision did not (and could not) resolve the federal law claims that were being litigated in the Ninth Circuit.

5. On November 14, 2001, the Port of Oakland, the City of Alameda, and the two citizens' groups entered into a partial settlement agreement. That agreement did not require dismissal of the federal litigation, nor did it

resolve the disputes between the FAA and the petitioners. Nevertheless, the Port of Oakland provided a copy of the partial settlement agreement to the Ninth Circuit. The FAA was not a party to the partial settlement agreement, and it did not participate in negotiating the partial settlement agreement.

6. On March 18, 2002, after all parties had completed briefing on the merits in the Ninth Circuit, and within a few weeks of the scheduled oral argument, the Ninth Circuit issued an order stating that the Court lacked jurisdiction to hear the case and providing any party who objected to the order 14 days to submit a response. The FAA submitted a response objecting to the order, and the Port of Oakland joined in the FAA's response. On April 4, 2002, the Ninth Circuit issued a final order concluding that it lacked jurisdiction. See FAA's Petition For A Writ of Certiorari, App. A at 1a-5a. Accordingly, the Ninth Circuit transferred the proceeding to the United States District Court for the Northern District of California.

7. On October 8, 2002, the Port of Oakland, the City of Alameda, and the two citizens' groups entered into a second settlement agreement resolving all of the disputes between the settling parties. Among other matters, the settlement agreement required that within ten days following the City of Alameda's receipt of payment of its attorneys' fees from the Port of Oakland, the petitioners would dismiss their federal suit challenging the FAA's approval of the airport development program and revised Airport Layout Plan. Pursuant to the settlement agreement, the petitioners requested dismissal of the federal proceeding on December 18, 2002; the District Court ordered dismissal on December 20, 2002; and the petitioners provided notice of the entry of that order on December

30, 2002. See FAA's Motion To Vacate, App. A & B at 1a-4a. The FAA was not involved in the settlement negotiations, and it was not a party to the settlement agreement requiring dismissal of the federal proceedings.

8. In light of the settlement and dismissal, on January 6, 2003, the Port of Oakland waived its right to respond to the FAA's petition for a writ of certiorari. On or about February 5, 2003, the FAA informed this Court of the settlement and dismissal, and filed a motion to vacate the Ninth Circuit's final order.

9. The Port of Oakland agrees with the arguments submitted to this Court by the Solicitor General on behalf of the FAA. The FAA's Record of Decision states that the FAA's approval of the revised Airport Layout Plan for the Port of Oakland's proposed airport development program was undertaken pursuant to both Part A and Part B of Subtitle VII of Title 49. Accordingly, jurisdiction for the action challenging the Record of Decision was proper in the Ninth Circuit under 49 U.S.C. § 46110(a). The Ninth Circuit appears to have mistaken the petitioners' legal cause of action – failure to comply with the provisions of the National Environmental Policy Act – for the statutory basis for the FAA's Record of Decision. If this Court concludes that the dismissal of the case prevents it from hearing the jurisdictional issue, then the Port of Oakland agrees with the FAA that the Ninth Circuit's judgment should be vacated.

REASONS FOR GRANTING THE PETITION AND/OR VACATING THE JUDGMENT

The Port of Oakland concurs with the arguments raised in the FAA's petition for certiorari. As the FAA explains, the Ninth Circuit's decision misinterprets 49 U.S.C. § 46110(a), conflicts with decisions of other circuit courts, and undermines Congressional intent.

Under 49 U.S.C. § 46110(a), the Court of Appeals has exclusive jurisdiction over a legal claim by "a person disclosing a substantial interest in an order issued . . . under this part" – *i.e.*, Part A of Subtitle VII of Title 49. The FAA's Record of Decision contains a number of determinations under Part A and it expressly states that the FAA approved the Airport Layout Plan for the proposed airport development program based in part on 49 U.S.C. § 40103(b), a statutory provision in Part A. See FAA's Petition For A Writ of Certiorari at 3-4, 8 & App. B at 39a. As the FAA explains, the most straightforward and sensible conclusion is that the petitioners' challenge of the Record of Decision was properly brought in the Court of Appeals.

A recent Second Circuit case that relies on the Ninth Circuit's decision highlights the split of authority in the Courts of Appeal. In that case, the Second Circuit expressly rejected the Tenth Circuit's interpretation of appellate jurisdiction over FAA orders for airport development projects. See *Committee to Stop Airport Expansion v. FAA*, Docket No. 01-4181, 2003 U.S. App. LEXIS 2404, at *11 (2d Cir. Feb. 11, 2003) (rejecting the reasoning of *National Parks & Conservation Assn. v. FAA*, 998 F.3d 1523, 1527-28 (10th Cir. 1993)). This inter-circuit conflict

will only worsen as more jurisdictional disputes arise involving airport projects.

Equally important for the nation's airports, the Ninth Circuit's decision creates substantial uncertainty and confusion for judicial review of FAA orders. Under the logic of the decision, jurisdiction depends *not* on the nature of the FAA order being challenged, but on the petitioners' legal arguments. Thus, the Court concluded that it lacked jurisdiction because the petitioners' legal claims did not raise issues related to Part A. On the other hand, the opinion strongly suggests that appellate jurisdiction is proper where the legal claims are related to matters under Part A. Where, as here, the initial petition for review does not specify any of the legal claims being asserted or which portions of the FAA order are being challenged, it is possible that jurisdiction will not be decided until long after the case has been filed, when the parties submit their briefs. This situation creates enormous inefficiencies – especially in light of the very different statute of limitations that apply to the two different types of actions.

The nation's airports need a predictable, rational, and time-sensitive system of judicial review for decisions about important airport development projects. Such a system had been firmly in place for many years under Title 49. The Ninth Circuit's decision threatens to throw this well-established system into chaos. Without action by this Court, the decision will unnecessarily complicate judicial review of FAA orders approving airport projects and delay vitally needed airport improvements.

For these reasons, the Port of Oakland concurs with the arguments presented by the FAA. In the event the Court concludes that it cannot hear the merits of the case

in light of the settlement and dismissal of the action, the Port of Oakland agrees with the FAA that the Ninth Circuit's jurisdictional order should be vacated.

Respectfully submitted,

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